

Pfluger (Migration) [2019] AATA 2443 (9 May 2019)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Miss Jessica Pfluger

CASE NUMBER: 1731276

HOME AFFAIRS REFERENCE(S): BCC2016/2231369

MEMBER: P. Maishman

DATE: 9 May 2019

PLACE OF DECISION: Perth

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:

- cl.820.211(2)(a) of Schedule 2 to the Regulations
- cl.820.221(1) of Schedule 2 to the Regulations
- r.2.03A

Statement made on 09 May 2019 at 4:18pm

1. CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Spouse) –genuine spousal partners – evidence of financial and social aspects of relationship provided – shared household duties – legal obligations in relation to distribution of estates – mutual commitment to shared life together to exclusion of all others – genuine and continuing relationship – decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), ss 5, 65, 360

Migration Regulations 1994 (Cth), rr 1.09, 1.15, 2.03A, Schedule 2, cls 820.211, 820.221

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Immigration and Border Protection to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
3. The applicant applied for the visa on 30 June 2016 on the basis of her relationship with her sponsor, Mr Leopold Oud. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2)(a) because the delegate was not satisfied the applicant was the spouse or de facto partner of the sponsor.
5. In reaching its decision the Tribunal did not consider a hearing to be necessary, as it was able to find in favour of the visa applicant on the basis of the material before it, pursuant to s.360(2)(a) of the Act.
6. The applicant was represented in relation to the review by her registered migration agent.
7. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

Consideration of claims and evidence

8. The Tribunal had before it a copy of the Department's file containing Ms Pfluger's visa application, the sponsorship form completed by Mr Oud and the documentary evidence referred to by the delegate.
9. The applicant provided a copy of the delegate's decision record to the Tribunal with her application for review. The applicant provided significantly more documentary information to the Tribunal than was before the delegate. The evidence provided to the Tribunal has been forwarded to the Department.
10. The applicant and the sponsor provided statutory declarations to the Tribunal on 14 August 2018. The statutory declarations outline the background and development of their relationship; details of their household and finances, social aspects and commitment to each other. The declarations are supported by the preponderance of evidence provided with the declarations. The Tribunal accepts the declarations and the information contained therein..
11. The issue in the present case is whether the applicant is the de facto partner or spouse of the sponsor.

Whether the parties are in a spouse or de facto relationship

12. Clause 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case, at the time of application, the applicant claimed to be the de facto partner of

the sponsor. The Department's file contains a copy of the sponsor's Australian passport. The Tribunal is satisfied that the sponsor is an Australian citizen.

13. 'De facto partner' is defined in 5CB of the Act, which provides that a person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).
14. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship.
15. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d).
16. In forming an opinion whether they are in a married or de facto relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.09A(3) for de facto relationships and r.1.15A(3) for married relationships. Each of the specific matters contained in r.1.09A(3) and r.1.15(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Were the parties in a married relationship at the time the application was made?

17. At the time the application was made and at the time of the delegate's decision the parties were not married. Accordingly the application was considered according to the criteria replying into a de facto relationship as defined in s.5CB of the Act.

Are the parties validly married at the date of this decision?

18. The Tribunal received a copy of a marriage certificate registered at the Registry of Births, Deaths and Marriages, Perth, Western Australia on 14 February 2018. The certificate records that the parties were married on 14 February 2018. There is no evidence to suggest that the marriage is not valid. On the evidence, the Tribunal finds that the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a) of the Act at the time of this decision.

Consideration of requirements for de facto and spousal relationships.

19. While the parties were validly married at the time of this decision, the parties were not validly married to each other under a marriage that is valid for the purposes of the Act at the time the application was made. Accordingly they cannot satisfy an essential requirement of a spouse relationship, but may meet the time of application criteria on the basis of being in a de facto relationship as defined in s.5CB of the Act.
20. In considering these issues and in reaching its decision the Tribunal has considered the mandatory factors in both r.1.09A(3) and r.1.15A(3) together.
21. The Tribunal considered the declaration of the applicant and sponsor in relation to the development of their relationship. The parties evidence is consistent - they met in Germany at Christmas 2010 while the sponsor was on holidays. The sponsor returned to Australia and they remained in casual contact. The applicant came to Australia in April 2013 and stayed

with the sponsor and his then wife. The sponsor's relationship with his wife deteriorated and they separated in November 2013. The applicant departed Australia in April 2014 and the applicant and sponsor stayed in touch by Skype. The applicant joined the sponsor in June 2014 in Berlin. They lived together and travelled and moved to Perth together in December 2015. The sponsor proposed to the applicant in July 2017. They formally married in a registry wedding on 14 February 2018 with a ceremony conducted on 25 March 2018 in Bali.

22. The Tribunal considered the evidence in relation to the financial aspects of the relationship. The applicant and sponsor were jointly responsible for the payment of rent under a sublease agreement while they were in Berlin for eight months from August 2014. Course fees for the applicant's TAFE studies were paid from the sponsor's bank accounts. Invoices for services rendered by the applicant contain details of the sponsor's bank account and the transaction statements confirm the sponsor's account is used by the applicant. The applicant and sponsor's last will and testament are made out to the benefit of each other. The applicant is the main beneficiary of the sponsor's superannuation. The sponsor has purchased a house in his sole name on the basis that is a self-funded retiree he is eligible for certain tax and stamp duty advantages. The applicant and sponsor undertook renovations together. The applicant and sponsor both state that they share their finances equally and aren't worried about specifically who pays for what. They use the applicant's European account when they are in Europe and use the sponsor's Australian account when they are in Australia.
23. The Tribunal is satisfied that the applicant and sponsor pool their financial resources for each other's benefit. They share the day-to-day household expenses. They have legal obligations in relation to the distribution of their estates. The Tribunal is satisfied that the financial aspects of the applicant and sponsors relationship are indicative of people in a married or de facto relationship.
24. The Tribunal considered the nature of the applicant and sponsors household. The parties have lived together as a couple since entering into a lease in Berlin at least from the beginning of August 2014. When that lease expired they travelled together and came to Australia in December 2015. Since they have lived together they share the cooking and cleaning, shopping and washing. The sponsor undertakes the duties outside the house like gardening.
25. The Tribunal is satisfied that the nature of the applicant and sponsors household is indicative of people in a married or de facto relationship.
26. The Tribunal considered the social aspects of the applicant and sponsors relationship. The applicant provided a number of letters of support and statutory declarations from friends, family and acquaintances. Each declarant attests that the applicant and sponsor are known to be and considered to be a couple since 2014 and married since 2018. The applicant has provided a number of copies of acceptances to their wedding invitations. The Tribunal accepts the evidence of the declarants. Photos provided by the applicant show a number of individual holiday scenes, outings with friends and family, and various travel locations.
27. The Tribunal finds that the applicant and sponsor represent themselves as being in a relationship with each other and their friends and acquaintances consider them to be so. The Tribunal is satisfied that the social aspects of the applicant and sponsors relationship are indicative of people in a married or de facto relationship.
28. The Tribunal considered the nature of the applicant and sponsors commitment to each other. The evidence supports that the applicant and sponsor have been in a de facto or married relationship since 2014. They have travelled together and the sponsor supports the applicant in her endeavours to study and start her own business. They have lived together as a couple

since August 2014 and married in February 2018. They see their relationship as long-term and plan their future with each other together.

29. The Tribunal is satisfied that the nature of the applicant and sponsors commitment to one another is indicative of people in a married or de facto relationship.
30. Based on the evidence before it, the Tribunal is satisfied that at the time of the application the parties had a mutual commitment to a shared life to the exclusion of all others. The Tribunal is satisfied that at the time of the application the parties were in a genuine and continuing relationship and that the parties lived together or not separately and apart on a permanent basis.
31. The Tribunal is also satisfied that the parties are not related by family.
32. Having considered all of the circumstances of the relationship including the evidence relating to the financial and social aspects and the nature of the parties household and their commitment to each other as set out in r.1.09A(3).
33. The Tribunal is satisfied that the requirements s.5CB(2) are met at the time the visa application was made.

Are the additional criteria for a de facto relationship met?

34. Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in r.2.03A. Both members of the couple must be at least 18 years old: r.2.03A(2). In this case, at the time of application, the applicant and the sponsor were at least 18 years old.
35. The applicant must have been in the de facto relationship for at least the 12 month period ending immediately before the date of the application: r.2.03A(3). This requirement will not apply in limited circumstances, such as: where the de facto relationship has been registered under a relevant State or Territory law (for applications made on or after 9 November 2009); where the applicant can establish compelling and compassionate circumstances for the grant of the visa; or in certain circumstances where the sponsor held, holds or is applying for a permanent humanitarian visa.
36. There is no evidence that the relationship is registered under a relevant State or Territory law or that the sponsor held, holds or is applying for a permanent humanitarian visa, so they must meet the 12 month requirement. The visa application was made on 1 July 2016. As detailed above, the Tribunal accepts the evidence that the applicant and sponsor were in a de facto relationship from at least the time they were entered into the joint lease in Berlin in August 2014. Accordingly, the Tribunal is satisfied that the applicant had been in the de facto relationship for at least the 12 month period ending immediately before the date of the application.
37. For these reasons the Tribunal is satisfied that the applicant meets the additional criteria prescribed in r.2.03A.
38. Accordingly the Tribunal finds that the applicant meets cl.820.211(2)(a).
39. The Department's file contains a sponsorship form completed by the applicant's spouse. The Tribunal is satisfied that the applicant is sponsored.

40. The applicant was in Australia on a student visa when she made her application for a Partner visa. The delegate found that the applicant lodged a valid application. The Tribunal finds that the applicant was the holder of a substantive visa when she applied for the Partner visa.
41. The applicant meets cl.820.211(2)(c) and (d).
42. In assessing whether the parties meet the criteria for a spouse relationship at the time of decision, the Tribunal has considered all of the circumstances of the relationship including the evidence relating to the financial and social aspects and the nature of the parties household and their commitment to each other as set out in r.1.15A(3). The Tribunal's consideration of these factors is outlined earlier in this decision. On the basis of the evidence, the Tribunal is satisfied that at the time of decision the applicant and sponsor have a mutual commitment to a shared life as a married couple to the exclusion of all others and that the relationship is genuine and continuing. The Tribunal is further satisfied that at the time of the decision the parties live together.
43. The Tribunal is satisfied that the requirements of s.5F(2)(b)-(c) are met at the time of this decision.
44. The Tribunal finds that the applicant continues to meet cl.820.211(2) at the time of this decision.
45. Accordingly the Tribunal finds that the applicant meets cl.820.221(1).
46. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

47. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
 - cl.820.211(2) of Schedule 2 to the Regulations
 - cl.820.221(1) of Schedule 2 to the Regulations
 - r.2.03A

P. Maishman
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.09A De facto partner and de facto relationship

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits *the* regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).